IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1501 OF 2007.

Prem Ratan Gupta. ... Petitioner.
Versus.
Smt.Sindhubai Baban Ranawade
and others. ... Respondents.

Shri S.M.Gorwadkar for the Petitioner.

Shri S.A.Sawant for the Respondents Nos.1 to 6.

CORAM : ABHAY S.OKA, J.

DATED : 16th June, 2007.

P.C.:

1. Heard the learned Advocate appearing for the Petitioner. The challenge in this petition under Article 227 of the Constitution of India is to the order dated 12th September 2006 passed by the learned trial Judge by which an Application made by the Petitioner at Exh.406 has been rejected. The Petitioner is one of the Defendants in a suit filed by the Respondents Nos.1 to 6. In the Application at Exh.106 the first prayer made by the Petitioner is for framing and deciding the issue of maintainability of the suit on the ground of bar of limitation and res-judicata. The second prayer is to reject the plaint or to dismiss the suit of the Plaintiff for playing fraud upon the Court.

2. The learned Advocate for the Petitioner

submitted that in the earlier suit filed by the 8th Respondent, all issues have been concluded against the Respondents Nos.1 to 6 who are the Plaintiffs in the present suit and in the second Appeal, the decree passed in the earlier suit has been confirmed. It is submitted that on a plain reading of the plaint, the suit was barred by limitation. He submitted that the filing of the suit by the first to sixth Respondents is an abuse of process of law. He submitted that the Court should have dismissed the suit inasmuch as the entire claim of the Plaintiffs has been adjudicated upon in the earlier suit.

3. The paragraph 2 of the impugned order shows that at the time of hearing of the Application, two submissions were advanced before the trial Court. The first submission was as regards the framing of preliminary issue on the ground of bar of limitation and res-judicata and the second was for rejection of plaint.

4. A perusal of the impugned order shows that the contentions which are sought to be canvassed before this Court regarding abuse of process of law by the 1st to 6th Respondents and the fraud committed by the said Respondents were not raised before the trial Court. In my view, the learned trial Judge has rightly observed that the issues raised regarding bar of limitation and

res-judicata are mixed questions of law and fact and therefore, the said issues cannot be decided as preliminary issues. For rejecting the plaint under the clause (d) Rule 11 of Order VII of the Code of Civil Procedure, 1908, it must appear to the Court on the basis of the statements made in the plaint that the suit is barred by any law. It is obvious that only on the basis of the statements made in the plaint, a finding regarding bar on the ground of res-judicata cannot be recorded, as for recording the said finding, it will be necessary to look into the judgment delivered in the earlier suit. In the earlier suit, the 1st to 6th Respondents were not the Plaintiffs and they were Defendants. On the basis of the statements made in the plaint, it cannot be concluded that the suit is barred by limitation. Therefore, the plaint could not have been rejected.

3. The submission of the learned Counsel appearing for the Petitioner is that this is a clear case of abuse of process of law and considering the provisions of Order VI Rule 16 and section 151 of the said Code, the Court has ample powers to dismiss the suit at any stage of the proceedings. It is obvious from the impugned order that these submissions were not canvassed before the learned trial Judge. Therefore, though the order of the trial Court regarding non-framing of preliminary

issue and refusal to reject the plaint will have to be upheld, the contentions raised by the Petitioner as regards the fraud and abuse of process of law will have to be expressly kept open. The Petitioner will always be at liberty to take out appropriate proceedings in that behalf at appropriate stage for raising the said contentions notwithstanding the impugned order.

5. Subject to what is observed earlier, the Writ Petition is rejected. It is made clear that notwithstanding the rejection of the petition, it will be open for the Petitioner to file an appropriate proceedings before the trial Court as observed earlier. All contentions in that behalf are expressly kept open.

Judge.